

DENNIS LANI AK MAT

a

v.

PP

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

SITI NORMA YAAKOB JCA

HAIDAR MOHD NOOR JCA

[CRIMINAL APPEAL NO: Q-05-66-97]

14 MAY 2001

c

CRIMINAL PROCEDURE: *Summing up - Direction to assessors - Defence of provocation - Whether sufficiently addressed by trial judge - Penal Code, Exception 1 to s. 300*

This was the appellant's appeal against his conviction and sentence for the offence of murder under s. 302 of the Penal Code. The issue was whether the trial judge failed to direct the assessors sufficiently the defence of grave and sudden provocation.

d

Held:

Per Siti Norma Yaakob JCA

e

[1] From the evidence it was clear that the prosecution relied purely on circumstantial and corroborative evidence to implicate the appellant to the charge of murder. The trial judge found such circumstantial and corroborative evidence overwhelming, a finding that this court endorsed. (p 711 e)

f

[2] The trial judge had correctly outlined the evidence of the prosecution case to the assessors, in particular the evidence of provocation. She had appraised the assessors as to the defence of grave and sudden provocation and left the matter of deciding as to whether the appellant had been deprived of his power of self-control entirely to the assessors. Under those circumstances, the appellant had been given a fair trial and the offence of murder had been proved against the appellant in accordance with the law. (p 713 e-g)

g

[Appeal dismissed; conviction and sentence affirmed.]

h

i

a [Bahasa Malaysia Translation Of Headnotes]

b Ini adalah rayuan perayu terhadap pensabitan beliau dan hukuman bagi kesalahan membunuh di bawah s. 302 Kanun Keseksaan. Isunya adalah sama ada hakim perbicaraan telah gagal untuk mengarahkan pentafsir-pentafsir secukupnya berhubung dengan pembelaan bangkitan marah besar dan mengejut.

Diputuskan:

Oleh Siti Norma Yaakob HMR

c [1] Daripada keterangan ianya jelas bahawa pihak pendakwaan telah bergantung semata-mata pada keterangan keadaan dan keterangan sokongan untuk membabitkan perayu kepada pertuduhan membunuh. Hakim perbicaraan mendapati keterangan keadaan dan keterangan sokongan sangat mempengaruhi, suatu keputusan yang diendorskan oleh mahkamah ini.

d [2] Hakim perbicaraan telah secara betul memberikan kenyataan butir-butir benar keterangan kes pihak pendakwaan kepada pentafsir-pentafsir khususnya keterangan mengenai bangkitan marah. Beliau telah mentafsirkan kepada pentafsir-pentafsir tersebut berhubung dengan pembelaan bangkitan marah besar dan mengejut dan membiarkan perkara membuat keputusan berhubung dengan sama ada perayu telah terlucut kuasa pengawalan diri sendiri kepada pentafsir-pentafsir tersebut. Dalam keadaan sedemikian, perayu telah diberikan suatu perbicaraan yang adil dan kesalahan membunuh telah terbukti terhadap perayu menurut undang-undang.

e
f [Rayuan ditolak; sabitan dan hukuman disahkan.]

Legislation referred to:

Penal Code, ss. 85, 300, 302

g For the appellant - Narmal Singh; M/s Narmal Singh & JB Singh
For the respondent - Hashim Hamzah DPP (Sulaiman Ibrahim DPP)

[Appeal from High Court, Miri; Criminal Trial No: 45-09-95(MR)]

Reported by Usha Thiagarajah

h

i

JUDGMENT**Siti Norma Yaakob JCA:**

The appellant was charged and convicted for the offence of murder and sentenced to death under s. 302 of the Penal Code. In appealing against both his conviction and sentence, the appellant cited 13 grounds in his petition but before us, his assigned counsel, Mr. Narmal Singh, was content to rely on only one ground. That ground relates to the issue as to whether the Judicial Commissioner had failed to direct the two assessors as to the defence of provocation.

The victim in this senseless killing was a 17 year old sales assistant who worked at a supermarket called Pelita Supermarket in Miri. At the time of her death, she was staying with her aunt and uncle at Kampong Dayak, Canada Hill, not far from the supermarket. She would leave the house at 8am every morning for the supermarket and return home the same day at 9.30pm by using a foot path at Canada Hill.

On the morning of 2 November 1992, passers-by discovered her half naked body in a drain at the foot of Canada Hill. Her aunt who identified her at the scene testified that the deceased never reached home the night before. Likewise the deceased's section supervisor at Pelita Supermarket who also identified her at the scene, confirmed that she had left the supermarket just before 9pm the previous night but never reported for work the next day ie, on 2 November 1992.

The Investigating Officer, PW20, recovered a number of personal items at the scene but of particular interest were the following found on the body of the deceased.

- (1) Hair near the stomach area of the deceased.
- (2) Hair at the left thigh and near the buttock region of the deceased.
- (3) Hair in the deceased's left hand.
- (4) Bamboo leaves in the deceased's vagina.

On 6 November 1992, Dr. Hajjah Sardar Jehan, a forensic pathologist conducted a post mortem at the Hospital mortuary in the presence of the Investigating Officer and recovered the tip of a tongue from the deceased's mouth. Dr. Hajjah Saridar Jehan never got to produce her post mortem report as she died before the trial commenced. In her place, her colleague, one Dr. Jamil bin Dolkadir @ Abdul Kadir, PW26, produced and explained the post mortem report instead.

a Following police investigations, the appellant was arrested at a logging camp on 8 November 1992, at 1am, six days after the deceased's body was discovered at Canada Hill. A physical examination of the appellant done by Dr. Aliousas Silva, PW25, the next day showed:

b (1) that he had multiple superficial abrasions all over his body except his face.

(2) that he had three deep abrasions or scratch marks about a week old on the anterior front portion of his body.

c (3) that he had four abrasions on his penis.

(4) that the tip of his tongue measuring 1cm had been amputated. There is evidence that such amputation was not self-inflicted as the edges were pointing outwards. The cross-examination of PW25, recorded the following evidence.

d The tongue is a very sensitive organ of the body. It is painful if we bite our own tongue. This is because the tongue area has a lot of nerves. If the tongue is bitten and a portion is cut off my experience there would be severe pain, normally it would last 3 to 4 days.

e PW25 also took samples of the appellant's blood for cross matching as well as samples of his nail clippings, his pubic hair and head hair.

Expert evidence on the samples of the appellant's hair was given by the chemist, PW23, who testified that:

f (1) the hair found in the deceased's left hand matched the sample head hair taken from the appellant. The presence of hair root in the hair found in the deceased's left hand was consistent with the hair being forcibly pulled.

g (2) the hair found on the deceased's left buttock also matched the sample pubic hair taken from the appellant.

h There was also corroborative evidence given by the appellant's aunt, PW3, with whom the appellant had stayed from October to November 1992, that on the night of 1 November 1992, she had opened the door to let the appellant into the house. She noticed that he was drunk and bleeding from the mouth. He admitted to her that he was involved in a fight and that he had raped a girl.

i

The appellant's mistress, PW4, also testified that she found him bleeding from the mouth on the night of 1 November 1992, and that his shirt was soaked with blood.

a

The medical evidence showed that the deceased had been raped and suffered extensive injuries to the head. The whole of her upper right skull was fractured at three places and was smashed in. Her base skull was also fractured and was broken in two parts, front and back. The intracranial area which would normally contain brain fluid was filled with blood due to massive bleeding. The cause of death was due to multiple comminuted fractures of the skull with intracranial haemorrhages. Such extensive internal injuries according to PW26, the doctor who explained the post mortem report, can cause immediate death with no chance of survival.

*b**c*

The nature of the deceased's injuries was also consistent with her being badgered with a hard object and in this respect there is the undisputed evidence of PW20 of his recovery from the scene three pieces of broken stones near the deceased's legs. He also noticed blood stains at the spot where the stones were found.

d

From the evidence it was clear that the prosecution relied purely on circumstantial and corroborative evidence to implicate the appellant to the charge of murder. The Judicial Commissioner found such circumstantial and corroborative evidence to be overwhelming, a finding that we entirely endorse and she called upon the appellant to enter his defence to the amended charge of murder. For completeness we need to mention that the prosecution had also succeeded in admitting the appellant's cautioned statement but we say that even in the absence of such cautioned statement there was more than sufficient circumstantial evidence to support the charge of murder.

*e**f*

The appellant elected to give evidence on oath and apart from himself called no other witness. He admitted killing the deceased but justified his action on the grounds that:

g

- (1) he was drunk at the time of the killing and was so intoxicated as to be incapable of forming the required intention to kill, a defence under s. 85 of the Penal Code and
- (2) that he was deprived of his power of self control by grave and sudden provocation when the deceased bit his tongue which caused him immense pain, and in retaliation he badgered her head with a stone. This defence was made pursuant to Exception 1 of s. 300 of the Penal Code.

*h**i*

- a* It was in respect of the second defence that we were concerned with in this appeal and the objection taken was that there had been a misdirection when the Judicial Commissioner failed to direct the assessors as to the defence of grave and sudden provocation.
- b* Exception 1 to s. 300 contains the following provisions:
- Exception 1 – Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person, who gave the provocation, or causes the death of any other person by mistake or accident.
- c* The above exception is subject to the following provisos:
- (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
- (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
- d*
- (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.
- e* Explanation – Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.
- The question posed before us was whether the above provisions had been sufficiently directed by the learned Judicial Commissioner in the course of her summing up to the assessors. Her summing up runs to 35 pages of type written notes. In particular directions on the defence of grave and sudden provocation runs from p. 25 to p. 30. She begins by stating the effect what that defence has on the prosecution's case and that the burden is on the appellant to prove that he was gravely and suddenly provoked that he lost his self control when the deceased bit his tongue. She also explains that the burden is a light one as all the appellant needed to prove was on a balance of probability. She then proceeds to explain that the defence is subject to three exceptions as provided for by the Penal Code and she supports those exceptions by illustrations. She also explains the meaning of the right of private defence and she ends her summing up with the following words:
- f*
- g*
- h* Gentlemen Assessors,
- The Defence put forward, in this case, is that of grave and sudden provocation. I have summed up to you what constitutes grave and sudden provocation. You have heard the evidence of both the Prosecution and the Defence. The Defence story is that the deceased in biting the accused's
- i*

tongue, caused him intense pain and hence the accused lost his control which resulted in him hitting the deceased and causing her death. It has been submitted on his behalf by his counsel that the accused only realised the object he picked up was a stone after the incident and if the accused had really wanted to kill the deceased he would have prepared himself then. Therefore, the accused acted on the spur of the moment whilst deprived of his power of self control under grave and sudden provocation.

*a**b*

Gentlemen Assessors,

Let me remind you again that what amounts to grave and sudden provocation is a question of fact. As judges of fact it is for you to decide whether in this case the accused was deprived of the power of self control by grave and sudden provocation. In so deciding you have to look at the evidence adduced in this trial and ascertain for yourselves, as judges of fact, whether the evidence shows that the accused was deprived of his power of self control by grave and sudden provocation.

c

It was based on that summing up that both assessors affirmed the question put to them “that the prosecution had proved beyond all reasonable doubt that the fatal wounds found on the body of the deceased, Senya ak Belong, caused by the accused were not caused whilst the accused was deprived of the power of self-control by grave and sudden provocation.”

d

We have read the summing up in its entirety and we cannot not see where the Judicial Commissioner had gone wrong in her directions to the assessors as to the defence of grave and sudden provocation. We found that she had correctly outlined the evidence of the prosecution’s case to the assessors in particular the evidence of provocation. She had appraised the assessors as to the defence of grave and sudden provocation and left the matter of deciding as to whether the appellant had been deprived of his power of self control entirely to the assessors. Under these circumstances we consider that the appellant had been given a fair trial and that the offence of murder had been proven against the appellant in accordance with the law. As we had no justifiable reason to disturb the findings of the trial judge, we had dismissed the appellant’s appeal and confirmed his conviction and sentence.

*e**f**g*

*h**i*